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this Memorandum Decision shall not be
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establishing the defense of res judicata,
collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

LENN IVY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0603-CR-167
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0408-FB-155928

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Lenn Ivy, pro se, appeals his habitual offender adjudication and sentence that were based on a written plea agreement. Ivy raises a single dispositive issue for our review, namely, whether the trial court committed fundamental error when it determined that a factual basis existed to support the habitual offender adjudication.

We dismiss Ivy's appeal.

FACTS AND PROCEDURAL HISTORY

On August 30, 2004, the State charged Ivy with Burglary, as a Class B felony; Theft, as a Class D felony; and Resisting Law Enforcement, as a Class A misdemeanor. On October 20, 2004, over Ivy's objection, the trial court granted the State's motion to add an habitual offender charge. As a result of that amendment to the charging information, Ivy requested and was granted a continuance of his trial date.

On May 11, 2005, Ivy pleaded guilty under a written plea agreement to burglary, as a Class B felony, and to the "habitual offender enhancement[.]"¹ and the State dropped the theft and resisting law enforcement charges. Appellant's App. at 86. Ivy also agreed to a sixteen-year executed sentence. The trial court sentenced Ivy to six years on the burglary count to be enhanced by ten years based on Ivy's habitual offender status. This appeal ensued.²

¹ Ivy was represented by counsel both when he entered into the plea agreement and when he was sentenced.

² Ivy and the State refer to the instant case as a belated appeal. However, we note that the Chronological Case Summary ("CCS") indicates that Ivy filed within thirty days of the sentencing hearing correspondence with the trial court indicating his desire to appeal and requesting pauper counsel. Ivy subsequently sent additional correspondence to the trial court asking about the status of his request to appeal. On February 9, 2006, the trial court noted in the CCS that Ivy had filed correspondence

DISCUSSION AND DECISION

Ivy contends that his guilty plea to the habitual offender charge is not supported by a factual basis because the State failed to establish the proper sequence of commission of the predicate offenses. The State counters that the case is not properly before this court because a challenge to a conviction after a guilty plea may only be raised in post-conviction proceedings. We must agree with the State.

In Weaver v. State, 676 N.E.2d 22 (Ind. Ct. App. 1997), trans. denied, Weaver pleaded guilty to two counts of dealing in marijuana and to being an habitual offender. He later appealed, contending that there was an insufficient factual basis for his habitual offender determination. This court held, in relevant part, that it could not address the merits of Weaver's contention. Id. at 24. "One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal." Id. "[A]n error premised upon a guilty plea must be brought by a petition for post-conviction relief[.]"³ Id. See also Stanley v. State, 849 N.E.2d 626, 630 (Ind. Ct. App. 2006).

Here, Ivy raises an identical claim to that raised in Weaver, namely, that there is an insufficient factual basis to support his plea to the habitual offender adjudication. Because a challenge to that adjudication cannot be raised on direct appeal, the claim is not properly before us. See Weaver, 676 N.E.2d at 24; Stanley, 849 N.E.2d at 630. We

expressing his intent to appeal and requesting counsel, and the court ordered the appointment of counsel. On February 13, 2006, Ivy's appointed counsel filed a belated notice of appeal.

³ Ivy also cites to Tumulty v. State, 647 N.E.2d 361 (Ind. Ct. App. 1995), as support for his contention that he may challenge the factual basis supporting his guilty plea on direct appeal. But, as the State notes, the supreme court granted transfer, vacating this court's opinion in that case, and on transfer held that post-conviction relief was the proper vehicle for challenging the factual basis supporting a guilty plea. See Tumulty v. State, 666 N.E.2d 394 (Ind. 1996).

cannot address the merits of Ivy's claim that the State failed to establish a factual basis to support the habitual offender adjudication and must dismiss his appeal.⁴

Dismissed.

MAY, J., and MATHIAS, J., concur.

⁴ Ivy also challenges the timeliness of the State's amendment to add the habitual offender charge. But because he pleaded guilty to being an habitual offender, that issue is waived.